Office - Supreme Court, U. S.
FILED
OCT 7 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 429

SCHOOL BOARD OF THE CITY OF NORFOLK AND C. W. MASON, SUPERINTENDENT OF SCHOOLS OF NORFOLK,
Petitioners,

v.

MELVIN O. ALSTON AND THE NORFOLK TEACHERS' ASSOCIATION,
Respondents

MEMORANDUM BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

LEON A. RANSOM
1512 Girard Street, N.E.
Washington, D. C.
THURGOOD MARSHALL
Baltimore, Md.
Counsel for Respondents

WILLIAM H. HASTIE
Washington, D. C.
OLIVER W. HILL
Richmond, Va.
BENJAMIN KAPLAN
New York, N. Y.
W. ROBERT MING, JR.
Chicago, Ill.
Of Counsel

Printed by Law Reporter Ptg. Co., 518 5th St., Washington, D. C.

SUBJECT INDEX

PAGE

Statement of Facts 1

Questions Involved 3

Argument

I. The decision that the alleged salary discrimination is a denial of equal protection of the laws is so clearly sound and consistent with precedent that it should not be reviewed 3

A. There is no conflict in the federal decisions on this proposition 3

B. There is no conflict between the decision of the Circuit Court of Appeals and applicable local decisions 4

C. The decision of the Circuit Court of Appeals is consistent with the course of decisions of this court construing the Fourteenth Amendment to the Constitution of the United States 5

II. The issue of waiver should not be reviewed upon the present record 6

Conclusion 9

TABLE OF CASES

	PAGE
Black v. School Board of the City of Norfolk (Unreported)	5
Buchanan v. Warley, 245 U. S. 60	6
Ex parte Virginia, 100 U. S. 339	6
Gaines v. Missouri, 305 U. S. 337	6
Gilbert v. Highfill, — Fla. —, 190 So. 813	5
Lane v. Wilson, 307 U. S. 268	6
McCabe v. A. T. & Santa Fe Ry. Co., 235 U. S. 151	6
Mills v. Anne Arundel County Board of Education, et al., 30 F. Supp. 245	4
Mills v. Lowndes, et al., 26 F. Supp. 792	4
Nixon v. Condon, 286 U. S. 73	6
Pierre v. Louisiana, 306 U. S. 354	6
Strauder v. West Virginia, 100 U. S. 303	6
Truax v. Raich, 239 U. S. 33	6
Yick Wo v. Hopkins, 118 U. S. 220	6
Yu Cong Eng v. Trinidad, 271 U. S. 500	6

STATUTES AND RULES CITED

Virginia Code:	
Section 664	7
Section 786	7
Federal Rules of Civil Procedure:	
Rule No. 7 (a)	8
Rule No. 8 (c)	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 429

SCHOOL BOARD OF THE CITY OF NORFOLK AND C. W. MASON, SUPERINTENDENT OF SCHOOLS OF NORFOLK,
Petitioners,

v.

MELVIN O. ALSTON AND THE NORFOLK TEACHERS' ASSOCIATION,
Respondents

MEMORANDUM BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

In opposing the petition for certiorari filed by petitioners herein, respondents respectfully show:

STATEMENT OF FACTS

Petitioners seek review of a judgment rendered upon pleadings. The judgment does not accomplish a final disposition of the case but merely decides that the complaint is legally sufficient and orders a trial of the controversy for the first time on its merits.

Respondents as plaintiffs in the District Court of the United States for the Eastern District of Virginia filed their complaint against the defendant School Board and the defendant Superintendent of Schools seeking a permanent

injunction against, and a judgment declaratory of, alleged unconstitutional racial discrimination in administratively established schedules of salaries for white and colored teachers in the City of Norfolk and in the salaries actually paid pursuant to such schedules. The essence of the complaint appears in paragraphs 11 and 12 thereof where it is alleged that:

> "11. Defendants over a long period of years have consistently pursued and maintained and are now pursuing and maintaining the policy, custom, and usage of paying Negro teachers and principals in the public schools of Norfolk less salary than white teachers and principals in said public school system possessing the same professional qualifications, certificates and experience, exercising the same duties and performing the same services as Negro teachers and principals. Such discrimination is being practiced against the plaintiffs and all other Negro teachers and principals in Norfolk, Virginia, and is based solely upon their race or color."
>
> "12. The plaintiff Alston and all of the members of the plaintiff association and all other Negro teachers and principals in public schools in the City of Norfolk are teachers by profession and are specially trained for their calling. By rules, regulations, practice, usage and custom of the Commonwealth acting by and through the defendants and its agents and agencies, the plaintiff Alston and all of the members of the plaintiff association and all other Negro teachers and principals in the City of Norfolk are being denied the equal protection of the laws in that solely by reason of their race and color they are being denied compensation from public funds for their services as teachers equal to the compensation provided from public funds for and being paid to white teachers with equal qualifications and experience for equivalent services pursuant to rules, regulations, custom and practice of the Commonwealth acting by and through its agents and agencies, the School Board of the City of Norfolk and the Superintendent of Schools of Norfolk, Virginia." (Record, pp. 7, 8.)

As appears in the judgment of the District Court (Record, pp. 30-31), the cause came on, at the suggestion of the District Judge, for preliminary hearing solely upon the issue of the legal sufficiency of the complaint as raised by so much of the answer as was in the nature of a motion to dismiss. Upon such hearing the District Court entered a final order sustaining the motion to dismiss the complaint. From that order the respondents appealed. The Circuit Court of Appeals for the Fourth Circuit reversed the judgment of the District Court and remanded the cause for trial (Record, p. 45).

QUESTIONS INVOLVED

I. THE DECISION THAT THE ALLEGED SALARY DISCRIMINATION IS A DENIAL OF EQUAL PROTECTION OF THE LAWS IS SO CLEARLY SOUND AND CONSISTENT WITH PRECEDENT THAT IT SHOULD NOT BE REVIEWED.

II. THE ISSUE OF WAIVER SHOULD NOT BE REVIEWED UPON THE PRESENT RECORD.

ARGUMENT

I

The Decision That the Alleged Salary Discrimination Is a Denial of Equal Protection of the Laws Is So Clearly Sound and Consistent With Precedent That It Should Not Be Reviewed

A. *There Is No Conflict in the Federal Decisions on This Proposition*

On the three other occasions that federal courts have passed on this question the decisions have been in accord with the conclusion reached by the Circuit Court of Appeals that:

"Plaintiffs, as teachers qualified and subject to employment by the state, are entitled to apply for the positions and to have the discretion of the authorities exercised lawfully and without unconstitutional discrimination as to the rate of pay to be awarded them, if their applications are accepted." (Record, p. 43.)

Even the District Court conceded that:

"The authorities are clear—that there can be no discrimination in a case of this kind, if such discrimination is based on race or color alone." (Record, p. 24.)

The only other federal court in which the question has been raised is that of the United States District Court for the District of Maryland. That court twice reached the same conclusion.

Mills v. *Lowndes et al.*, 26 F. Supp. 792 (1939);
Mills v. *Anne Arundel County Board of Education et al.*, 30 F. Supp. 245 (1939).

In the latter case the Court said:

". . . As already stated, the controlling issue of fact is whether there has been unlawful discrimination by the defendants in determining the salaries of white and colored teachers in Anne Arundel County solely on account of race or color, and my finding from the testimony is that this question must be answered in the affirmative, *and the conclusion of law is that the plaintiff is therefore entitled to an injunction against the continuance of this unlawful discrimination.*" (Italics supplied.) (30 Fed. Supp. at 252.)

B. *There Is No Conflict Between the Decision of the Circuit Court of Appeals and Applicable Local Decisions*

Although no question of local law is here presented since the right claimed by the respondents is one guaranteed by the Constitution of the United States, actually there is no

decision of a state court in conflict with that of the Circuit Court of Appeals here.

In the only reported state case, *Gilbert* v. *Highfill*, — Fla. —, 190 So. 813 (1939), mandamus was sought to compel the adoption of an equal salary schedule for white and Negro teachers. The Supreme Court of Florida held that mandamus would not lie to compel the adoption of any salary schedule, expressly stating however, at page 815:

> "We fully agree with counsel for the relator and the authorities cited in their brief on the question of discrimination and an equal protection of the law as guaranteed by the 14th Amendment to the Constitution of the United States, U. S. C. A. *We do not think either of these questions is presented by the record.*" (Italics supplied.)

In the unreported case of *Aline Black* v. *The School Board of the City of Norfolk et al.*, the Circuit Court of the City of Norfolk considered a demurrer to a similar petition for mandamus and ruled that mandamus was not the proper remedy. No mention was made of the substantive question here involved. (Record, p. 23.)

Similar actions filed in the Maryland counties of Montgomery, Prince George's and Calvert were made moot before trial by equalization of salaries pursuant to agreement.

Thus the state courts upon whose decisions petitioners rely have passed only on the procedural question and have not adjudicated the substantive question involved here.

C. *The Decision of the Circuit Court of Appeals Is Consistent With the Course of Decisions of This Court Construing the Fourteenth Amendment to the Constitution of the United States.*

It is submitted that certiorari should not be granted because the judgment of the Circuit Court of Appeals is clearly

sound, consistent with and follows closely a long line of precedents established by this Court.

A general effect of the Fourteenth Amendment to the Constitution of the United States is to prohibit arbitrary and unreasonable classification by state agencies.

Yu Cong Eng v. *Trinidad*, 271 U. S. 500 (1926);
Truax v. *Raich*, 239 U. S. 33 (1915);
Yick Wo v. *Hopkins*, 118 U. S. 220 (1886).

Discrimination because of race or color is clearly arbitrary and unreasonable. This Court has repeatedly so held in cases arising out of a variety of factual situations.

Lane v. *Wilson*, 307 U. S. 268 (1939);
Pierre v. *Louisiana*, 306 U. S. 354 (1939);
Gaines v. *Missouri*, 305 U. S. 337 (1938);
Nixon v. *Condon*, 286 U. S. 73 (1932);
Buchanan v. *Warley*, 245 U. S. 60 (1917);
McCabe v. *A. T. & Santa Fe Ry. Co.*, 235 U. S. 151 (1914);
Strauder v. *W. Virginia*, 100 U. S. 303 (1879);
Ex parte Virginia, 100 U. S. 339 (1879).

By the motion to dismiss petitioners have admitted that the existing salary differentiation is based solely on the race and color of the respondents and that it is adopted, maintained and enforced by petitioners acting for the Commonwealth of Virginia.

The Circuit Court of Appeals has logically applied the doctrine established by this Court to the facts of the instant case.

II

The Issue of Waiver Should Not Be Reviewed Upon the Present Record

Respondents agree with petitioners that it is an important Federal question whether Negroes who accept employment as public school teachers thereby waive their right to

complain that they are denied the equal protection of the laws by salary discrimination based solely upon race and imposed and required by rule, regulation and practice of an agency of the State. However, neither the present state of the record upon that issue nor the scope of the decision of the Circuit Court of Appeals warrants the granting of certiorari.

Paragraph 10 of the complaint (Record, p. 7) alleges that defendants, petitioners here, are under a statutory duty to employ teachers and to provide for the payment of their salaries, citing, *inter alia,* Section 786, of the Virginia Code of 1936 which provides in part that

> "The City school board of every city shall . . . have the following powers and duties . . . Third. To employ teachers . . . Twelfth. To . . . provide for the pay of teachers . . ."

It is further provided in Section 664 that

> "Written contracts shall be made by the school board with all public school teachers before they enter upon their duties, in a form to be prescribed by the Superintendent of Public Instruction."

Paragraph 15 of the complaint (Record, p. 9) alleges that plaintiff Alston, respondent here,

> "is being paid by the defendants for his services this school year as a regular male high school teacher as aforesaid an annual salary of $921."

Thus, from the complaint and the above quoted language of applicable Virginia statutes it seems a proper conclusion that respondent Alston is employed during the current year pursuant to a contract of hire and at an annual salary of $921. Moreover, in a preliminary proceeding in the nature of a hearing on motion to dismiss the complaint it was proper that the court determine whether any conclusion of

law fatal to the respondents' case followed from the facts outlined above. To that extent, and to that extent only, the question of waiver was before the District Court and the Circuit Court of Appeals.

It is to be noted that so much of the "Second Defense" in the answer as raises the issue of waiver is in form a defense in law in the nature of a motion to dismiss, but in substance it combines a challenge to the sufficiency of the complaint with an introduction of new matter in the nature of an affirmative defense. Thus, the sub-paragraphs numbered (4) and (5) (Record, p. 19) go beyond an allegation that acceptance of employment by the respondent is a waiver of the rights asserted in his complaint. These sub-paragraphs refer to the specific contract of the respondent and incorporate by reference an attached document described as a copy of his contract. In thus going beyond the fact of employment pursuant to a contract of hire as already revealed by the complaint and pertinent statutes, and in attempting to put in issue the terms of a particular contract, the circumstances of its execution and any legal conclusions that may depend upon such terms and circumstances, the petitioners introduced an affirmative defense. Under Rule 8(c) of the Federal Rules of Civil Procedure, such new matter is deemed to be denied without reply. Indeed, no reply is permitted except by order of the Court. See Rule 7(a). Therefore, the new matter alleged in the answer was not before the court on a motion to dismiss and is not material at the present stage of this litigation.

In brief, the question before the Circuit Court of Appeals was whether the facts (1) that respondent's status had been created by a contract of hire and (2) that he had been employed for a definite salary, operated as a matter of law to preclude this suit.

With the issue thus defined and restricted the Circuit Court of Appeals concluded that no waiver had been shown and remanded the case for trial.

The petition for certiorari neither comprehends the issue thus outlined nor suggests any reason for the review of the decision thereon. None of the parties will suffer any legal detriment from the order of the Circuit Court of Appeals requiring a trial of the entire cause on its merits. Questions of law can then be considered in the light of all material facts. Whatever the event of such a trial may be, the dissatisfied party or parties will be in position to ask that the issue of waiver be reviewed, along with any other matters in controversy, upon the complete record.

CONCLUSION

In such circumstances neither public interest nor the interests of the litigants will be served by the granting of certiorari as now prayed; but, on the other hand, orderly and complete disposition of this litigation can best be accomplished by remanding the cause for trial as ordered by the Circuit Court of Appeals.

Wherefore, we respectfully submit that the petition for certiorari should be denied.

LEON A. RANSOM
1512 Girard Street, N.E.
Washington, D. C.
THURGOOD MARSHALL
Baltimore, Md.
Counsel for Respondents

WILLIAM H. HASTIE
Washington, D. C.
OLIVER W. HILL
Richmond, Va.
BENJAMIN KAPLAN
New York, N. Y.
W. ROBERT MING, JR.
Chicago, Ill.
Of Counsel